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May 9, 2007

The Honorable Frederic Block
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
New York, New York 11201

Re: In re Holocaust Victim Assets Litigation:
Application of Burt Neuborne CV 06-0983 (FB)(JO)

Dear Judge Block:

I write briefly in connection with the Second Circuit's recent decision in *Arbor Hills Concerned Citizens v. County of Albany*, Docket No. 06-0086-cv (2nd Cir. April 24, 2007) (hereafter *"Arbor Hills"*).

The central issue presented to this Court by this proceeding is how to value the services of Mr. Neuborne as Lead Settlement Counsel. The Report and Recommendation submitted by Magistrate Judge Orenstein recognized that Judge Korman had agreed that Mr. Neuborne was to be paid a "reasonable fee" at the conclusion of the litigation, but had not specified a precise financial figure. Since Magistrate Judge Orenstein found that Judge Korman intended Mr. Neuborne's "reasonable fee" to be calculated on an hourly basis, and since the parties are in agreement that Mr. Neuborne has expended at least 6,878.5 hours, the question remains how to fix the hourly rate in order to set the "reasonable" value of Mr. Neuborne's services. Magistrate Judge Orenstein solved the problem by reconstructing a hypothetical negotiation between Judge Korman and Mr. Neuborne that would, he believed, have resulted in an hourly fee of between $450-$600 per hour.

In *Arbor Hills*, the Second Circuit faced a similar valuation issue, albeit in the context of a statutory fee-shifting case in which, absent a common fund recovery for the class, "reasonable fees" were payable by the defendant. There, a New York City law firm filed a fee petition in connection with litigation challenging the redistricting of the Albany County legislature. The District Judge, applying the Second Circuit's forum rule, awarded fees based upon prevailing market rates in the Northern District of New York. The firm appealed, arguing that prevailing Southern District rates were appropriate because, given the complexity of the case, it was reasonable to seek counsel outside the Northern District.

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Since this is neither a fee shifting case, nor is there any issue about differential market rates in various local markets, the precise holding of the Second Circuit in *Arbor Hills* does not apply in this common fund case.. What may provide guidance, however, is the discussion by the Circuit panel that the proper standard in a statutory fee-shifting case, regardless of forum, is "what a reasonable, paying client would be willing to pay." Slip Opinion, p. 3. In setting a "reasonable fee" in a fee-shifting case, *Arbor Hills* permits District Judges to reconstruct a hypothetical fee negotiation that would take into account all relevant case-specific factors, including the prevailing market rate, the difficulty and complexity of the case, the amount of time expended, the skill and expertise of the lawyer, the level of success obtained, and the non-economic motivations, if any, that induced the lawyer to take the case. The idea of attempting to reconstruct a negotiation between a hypothetical reasonable client and class counsel closely resembles the efforts of Magistrate Judge Orenstein to reconstruct a hypothetical negotiation between Judge Korman and Mr. Neuborne.

As the Court knows, Magistrate Judge Orenstein's hypothetical negotiation resulted in an hourly rate of between $450-$600. Magistrate Orenstein believed that factors such as the sympathetic nature of the plaintiffs, counsel's obvious concern for the plaintiffs, and his willingness to work without fees in many other cases, including the pre-settlement phase of this litigation, justified an award at the lowest edge of the "reasonable" range, or $450 per hour. In reconstructing a negotiation, however, *Arbor Hills* requires consideration of *all* case-specific factors, including actual behavior shedding light on what the parties deemed "reasonable.". When two such actual case-specific factors are considered in this case (neither of which was present in *Arbor Hills*), an award at the highest edge of the Magistrate Judge's range is required as a matter of law.

Unlike *Arbor Hills*, actual fee discussions have taken place in this case. As Magistrate Judge Orenstein found, Judge Korman, acting in his Rule 23(e) capacity as supervising judge and as a fiduciary for the plaintiff-classes, encouraged Mr. Neuborne to continue to carry out the demanding task of Lead Settlement Counsel by agreeing that he would be entitled to "reasonable" fees for his work at the close of the litigation. In this Circuit, an agreement to pay a "reasonable" fee in a $1.25 billion common fund case is a term of art that looks to the market to set the fee that would have emerged if actual bargaining had occurred. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000); *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96 (2d Cir. 2005). Often, such market-mimicking bargains result in payments that are a percentage of the common fund. Where Second Circuit common fund cases award fees on an hourly basis, courts routinely grant multiples of hourly market rates (*Goldberger* tripled the hourly figure; *Wal-Mart* awarded a multiple of nine). It was, therefore, improper for the Magistrate Judge to ignore the well-established meaning of "reasonable fee" in a common fund case in order to drive petitioner's fees well below the prevailing market rate.

Moreover, unlike *Arbor Hills*, where no internal case-specific benchmark of "reasonableness" existed, Judge Korman awarded a fee of $1.125 million to Robert Swift in 2002 for 2,000 hours of work, thereby establishing a case-specific benchmark of "reasonableness." As Judge Korman noted, his award compensated Mr. Swift at just under $600 per hour using 2002 rates. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 325 (E.D.N.Y. 2002). It is inconceivable that petitioner, entitled to 2005 rates, would receive a "reasonable" hourly rate of $450, fully 30% lower than the rate awarded to Mr. Swift. Judge Korman has explicitly noted that petitioner's legal ability, measured by his remarkably successful results as Lead Settlement Counsel, is materially superior to Mr. Swift's.[1] Accordingly, the "reasonable" hourly fee payable to petitioner simply cannot be 30% lower than the "reasonable" hourly fee awarded to Mr. Swift in this case.

In light of *Arbor Hills*, this Court should approve Magistrate Judge Orenstein's general approach, but supplement it by considering the parties' actual case-specific behavior described above. An examination of such actual case-specific behavior requires an award of at least $600 per hour, the same rate already awarded in this case to Mr. Swift, and within the range fashioned by the Magistrate Judge. Since Mr. Neuborne reaffirms his initial discounted fee petition, this Court need not reach the issue whether a fee award based on an hourly rate of more than $600 per hour is compelled by the record before the Court.

Petitioner believes that this matter is now ripe for resolution at the Court's earliest convenience. As Magistrate Judge Orenstein noted in his Report and Recommendation, Mr. Neuborne, having rendered "extraordinary legal services to the plaintiff-classes, is "[s]ome seven [now eight] years into his service as Lead Settlement Counsel in this litigation," without payment of a fee. Litigation over his entitlement to a fee has now persisted for 17 months, a difficult period filled with unfair personal recrimination. Magistrate Judge Orenstein's careful Report and Recommendation definitively disposes of all objections to the payment of a "reasonable fee" to Mr. Neuborne, leaving the issue of valuation for the Court's determination. The record is complete. It is time for this matter to be put to rest.

Respectfully submitted,

Samuel Issacharoff
Counsel for Burt Neuborne

Cc: Counsel of record on electronic distribution

[1] Judge Korman made his observations on relative legal ability during the telephone conference discussed at n.4 of Petitioner's April 29, 2007 Memorandum of Law. See Transcript of Tel. Conf, March 2, 2006. Docket Entry 12.